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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-548

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a–36a) is reported at 378 F. Supp. 558.

JURISDICTION

The judgment of the district court (J.S. App. 37a–38a) was entered on July 12, 1974. A notice of appeal to this Court (J.S. App. 39a–40a) was filed on August 8, 1974. On October 1, 1974, Mr. Justice Powell extended the time for docketing the appeal to and including November 6, 1974. The appeal was docketed on that date, and probable jurisdiction was noted on

January 13, 1975 (A. 64). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

A regulation of the Mississippi State Tax Commission requires out-of-state liquor distillers to collect a "wholesale markup" on alcoholic beverages sold to military officers' clubs and other nonappropriated fund activities located on military bases within Mississippi and to remit the "markup" to the Tax Commission. Two of the four military bases in Mississippi are enclaves of exclusively federal jurisdiction; the other two bases are on territory over which the United States and the State of Mississippi exercise concurrent jurisdiction. The questions presented are:

1. Whether the Mississippi regulation imposes an unconstitutional state tax on instrumentalities of the United States.

2. Whether the consent of the United States under the Buck Act to the imposition of state sales taxes on sales occurring within exclusively federal enclaves is inapplicable under the terms of that Act because Mississippi's tax is imposed upon instrumentalities of the United States.

3. Whether the Mississippi regulation is invalid under the Supremacy Clause because it conflicts with federal procurement regulations and policies promulgated under the general congressional power to regulate military affairs.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATION INVOLVED

The relevant provisions of the United States Constitution, the Buck Act, the Mississippi Local Option Alcoholic Beverage Control Law, and Regulation 25 of the Mississippi State Tax Commission are set forth in the appendix to this brief, *infra*, pp. 45–48.

STATEMENT

This case is here for the second time. The Court found it unnecessary to resolve in its prior decision the issues that are presented in the present appeal. See *United States* v. *State Tax Commission of Mississippi*, 412 U.S. 363.

1. The material facts are not in dispute.[1] Prior to 1966, Mississippi prohibited the sale or possession of alcoholic beverages. In that year, it adopted a Local Option Alcoholic Beverage Control Law which provides that the State Tax Commission is the sole importer and wholesaler of alcoholic beverages. Miss. Code 1972, §§ 67–1–1, *et seq.* The Commission is authorized to sell to retailers in the state "including, at the discretion of the commission, any retail distributors operating within any military post * * * within the boundaries of the state, * * * exercising such control over the distribution of alcoholic beverages as seem [*sic*] right and proper in keeping with the provisions and purposes" of the Act (§ 67–1–41).

[1] The case was submitted on a stipulation of facts (A. 29–42).

A related statute directs the Commission to add to the cost of alcoholic beverages a "markup" which in its judgment would be adequate to cover the cost of wholesaling, provide a reasonable profit, and render prices competitive with those in neighboring states (§ 27–71–11).

Pursuant to its authority under the statute, the Commission promulgated Regulation 25 (originally numbered 22), which authorizes military post exchanges, ship's stores, and officers' clubs to purchase liquor either from the Commission or directly from distillers. On direct purchases by such military facilities, the regulation requires that distillers collect and remit to the Commission the "usual wholesale markup" charged by the Commission on its own sales to retailers. During the period in issue, the wholesale markup was 17 percent on distilled spirits and 20 percent on wine (A. 36).

The officers' and noncommissioned officers' clubs and other nonappropriated fund activities on the four military bases in Mississippi had purchased liquor from out-of-state distillers and suppliers when Mississippi was a "dry" state, and they decided to continue this practice rather than purchase from the Commission (A. 36–37). Two of these bases, Keesler Air Force Base and the Naval Construction Battalion Center, are federal enclaves; exclusive jurisdiction over these lands was ceded to the United States by Mississippi, which retained only the right to serve civil and criminal process there (see *United States* v. *State Tax Commission of Mississippi, supra,* 412 U.S.

at 371–373). On the other two bases, Columbus Air Force Base and Meridian Naval Air Station, the federal government and the State exercise concurrent jurisdiction (A. 30).

Soon after the Mississippi regulation became effective, the military authorities commenced discussions with state officials in an unsuccessful effort to persuade them that the collection of the markup was improper. The military authorities also attempted to pay the amounts for the markup into an escrow fund until the matter could be judicially determined. The Commission, however, notified the distillers that if they did not remit the markups on their military sales to the Commission, the distillers would be subject to criminal prosecution and to delisting, *i.e.*, loss of the privilege of selling to the Commission for retailing in Mississippi (A. 37–38). To obtain liquor, therefore, the military facilities were required to pay the markup to the distillers. By July 31, 1971, $648,421.92 had been paid under protest to suppliers outside Mississippi for such markups (A. 39).

2. The United States instituted this action on November 3, 1969, seeking a declaration that the regulation is unconstitutional, an injunction against its continued enforcement, and a judgment for the amount already paid for markups.

The three-judge district court, convened pursuant to 28 U.S.C. 2281, granted summary judgment against the government. It held that the constitutional grants of authority to Congress to establish and regulate military forces and to exercise jurisdiction over lands

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belonging to the United States "are diminished by the express prohibition of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction" (340 Supp. 903, 904). The court did not address the government's other contentions—that the regulation imposes an unconstitutional tax upon federal instrumentalities and impermissibly interferes with federal procurement regulations and policy.

On direct appeal, this Court vacated the district court's judgment and remanded the case for further proceedings (412 U.S. 363). It held that "the District Court erred in concluding that the Twenty-first Amendment provides the State with sufficient authority over liquor transactions to support the application of the Regulation to the two bases over which the United States exercises exclusive jurisdiction" (*id.* at 368, fn. omitted). The Court declined to reach the issues that the district court did not address. "[W]e believe it would be useful to have the views of the District Court on these additional arguments, and we therefore remand the case to the District Court to allow it to consider initially the Government's instrumentality and Supremacy Clause arguments" (*id.* at 381).[2]

[2] The Court also declined to rule on the State's contention that the United States has consented under the Buck Act, 4 U.S.C. 105–111, to the imposition of the "markup" tax on sales

3. On remand, the three-judge district court again entered a judgment dismissing the government's complaint (J.S. App. 37a–38a). It held, with respect to liquor sales by out-of-state distillers to military facilities on the exclusively federal enclaves, that the State's markup requirement is a "sales or use tax" to which the United States has consented under Section 105(a) of the Buck Act, 4 U.S.C. 105(a) (J.S. App. 9a). Although it recognized that the State regulation by its own terms requires the out-of-state distiller "both to collect [the markup] from the military purchaser and pay it over to the State" (*id.* at 18a), the court ruled that the tax is not on an instrumentality of the United States within the meaning of the Buck Act's exception in 4 U.S.C. 107(a). It held that the "legal incidence" of the tax—which it defined as "the legally enforceable, unavoidable liability for nonpayment of the tax" (*ibid.*)—falls upon the distiller because the distiller is free to absorb the economic burden of the markup and "[t]he purchaser-vendee is not legally or otherwise obligated to the Commission or the State for payment of the markup" (*id.* at 21a).

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to military facilities on the two federal enclaves. "Having found that the District Court erred in the basis on which it did dispose of this case," this Court decided to leave "for determination by that court in the first instance on remand" the issues "[w]hether the markup should be treated as a tax on sales occurring within a federal area within the meaning of [4 U.S.C.] § 105(a), see also 4 U.S.C. § 110(b), and, if so, whether the exception contained in § 107(a) nevertheless serves to remove the markup from the consent provision for purposes of the two exclusively federal enclaves" (412 U.S. at 379).

The district court disposed of the government's constitutional tax immunity argument on the same ground: the markup is not an unconstitutional tax on federal instrumentalities, because the legal incidence of the tax falls on the distiller, not on the military purchasing facilities (*id.* at 27a). The court also ruled that "[t]here [is] no discrimination against the federal government within the State's tax scheme" (*id.* at 36a).

Finally, the court held that, "[s]ince the markup applies prorata to all wholesale liquor transactions, it does not alter the [military] vendee's competitive purchase equation and thus is incapable of interfering in any substantial way with the armed forces' policy of competitive liquor procurement under 'the most advantageous contract, price and other factors considered' " (*id.* at 33a–34a). Although the State regulation "may reduce the military's profit margin from retail liquor sales," "[t]he slight weight of this economic factor does not tip the balance in favor of a military exemption from the reach of the XXI Amendment" (*id.* at 35a). Like its ruling on the tax immunity issues, the court's decision on the military procurement policy issue rested on its view that, under the Mississippi regulation, "[o]nly the vendor, in his individual capacity, is subject to state control" (*ibid.*).[3]

[3] This aspect of the district court's opinion apparently was meant to apply only to the bases over which the United States and Mississippi exercise concurrent jurisdiction. The court believed that its resolution of the Buck Act issue with respect to the exclusively federal enclaves made it unnecessary to reach

SUMMARY OF ARGUMENT

In its prior opinion in this case, this Court held that the Twenty-first Amendment gives Mississippi no power to regulate, by taxation or otherwise, sales of liquor from out-of-state suppliers to military facilities located on the two enclaves of exclusively federal jurisdiction. With respect to those transactions, there is no "transportation or importation [of liquor] into [the] State * * * for delivery or use therein," within the meaning of Section 2 of the Twenty-first Amendment. The State argued in this Court, however, that the United States had consented under the Buck Act to the imposition of a markup on such sales to facilities on the exclusively federal enclaves. The Court remanded to the district court to permit it to consider that contention in the first instance.

The Court also declined to reach the other issues tendered by the government's appeal, both of which applied equally to all four bases in Mississippi. Those issues were whether the markup is an unconstitutional tax on instrumentalities of the United States and whether it is also invalid because it conflicts with federal procurement regulations and policy. As with the Buck Act question, the Court determined that it would be useful to have the district court's views on the instrumentality and Supremacy Clause issues.

The district court on remand decided all three of those issues adversely to the United States, and all three are presented by the present appeal.

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the military procurement issue as it affects those bases (J.S. App. 25a–26a, n. 21). But see pp. 33–34, n. 14, *infra*.

I

A. The district court correctly held that the markup is a sales tax and that the military purchasing facilities are instrumentalities of the United States. It erroneously concluded, however, that the legal incidence of the Mississippi tax falls upon the out-of-state seller rather than the military purchaser and that the constitutional doctrine of federal immunity from state taxation is therefore inapplicable.

The district court's definition of legal incidence—"the legally enforceable, unavoidable liability for nonpayment of the tax" (J.S. App. 18a)—was rejected by this Court in *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339. The Court there held that "a [state] sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (392 U.S. at 347), regardless of which party is legally responsible for payment to the State.

Agricultural Bank controls this case. The Mississippi regulation provides that the markup "shall be paid by [the military] organizations directly to the distiller," who "shall in turn remit" it to the State (App., *infra,* p. 48), and the State Tax Commission specifically instructed distillers that the markup "must be invoiced to the Military and collected directly from the Military" (A. 38). Like the Massachusetts sales tax in *Agricultural Bank,* the Mississippi markup "by its terms must be passed on to the purchaser" (392 U.S. at 347); it, too, "imposes the legal incidence of the tax upon the purchaser" (*ibid.*).

B. The federal government's immunity from state taxation is "the unavoidable consequence of that supremacy which the constitution has declared" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 436), and "this Court never has departed from that basic doctrine or wavered in its application" (*United States* v. *County of Allegheny,* 322 U.S. 174, 176). The Twenty-first Amendment gives the states broad power to regulate the sale and consumption of alcoholic beverages. But there is nothing in the Amendment's language or history to suggest that it was intended to negate so fundamental an incident of federalism as the United States' immunity from state taxation. The State's authority under the Twenty-first Amendment does not encompass the power to impose a sales tax upon facilities of the United States armed forces.

C. It is well established that a State tax may not, consistent with the Constitution, "discriminate against the Government or those with whom it deals" (*United States* v. *City of Detroit,* 355 U.S. 466, 473). The district court found the Mississippi tax nondiscriminatory, but we submit that it impermissibly discriminates against the government and those who deal with it in two ways.

If, as we argue, the incidence of the tax is upon the military purchasers rather than upon the distillers, the State's regulation discriminates against the United States in favor of the State's licensed retailers. They receive, in return for the wholesale markup that they pay, wholesaling, storage, and delivery services; as to them, the markup, at least in part, is compensation rather than taxation. The military facilities, however,

receive no services from the State in return for the markup they must pay on their direct purchases from out-of-state suppliers; as to them, the markup is a tax.

Moreover, even if the incidence of the tax were deemed to fall on the distillers, the tax would be discriminatory against those who deal with the United States. Distillers who sell only to the State pay no tax, while those who sell to the military must pay a 17 or 20 percent tax on each such sale. The State's regulation thus impermissibly fails to "treat those who deal with the Government as well as it treats those with whom [the State] deals itself" (*Phillips Chemical Co.* v. *Dumas Independent School District,* 361 U.S. 376, 385).

II

The Buck Act does not consent to the State's tax. Although the Act provides that no person shall be relieved from the payment of any State sales tax "on the ground that the sale * * * occurred in whole or in part within a Federal area" (4 U.S.C. 105(a)), it also provides that the consent "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof" (4 U.S.C. 107(a)). The Mississippi markup, as we have shown, is a tax levied on instrumentalities of the United States, and it therefore falls outside the scope of the Buck Act's consent.

III

Mississippi's regulation is also invalid for the independent reason that it impermissibly interferes with

the exclusive federal authority to regulate military procurement. Congress, in the exercise of its express constitutional authority to regulate military affairs, delegated to the Secretary of Defense plenary authority to promulgate regulations governing the traffic in alcoholic beverages on military bases. The Secretary's regulations provide that the procurement of liquor shall be conducted in such a manner as to "obtain for the Government the most advantageous contract, price, and other factors considered" (32 C.F.R. 261.4(c)(1)). That provision closely parallels the language of the general armed forces procurement regulation and reflects the same policy of requiring "active competition so that the United States may receive the most advantageous contract" (*Paul* v. *United States,* 371 U.S. 245, 253).

Mississippi's markup regulation collides with the federal procurement policy by inhibiting price competition for sales of liquor to the military in two respects. First, by requiring out-of-state distillers artificially to inflate their prices by the same 17 or 20 percent that the State itself adds as a wholesale markup, the regulation eliminates serious price competition between distillers on the one hand and the State Tax Commission on the other hand. Second, by purporting to limit the military's freedom to purchase liquor from out-of-state suppliers other than distillers, the regulation restricts the range of potential competitors for the military's business. In both cases, the regulation defeats the federal procurement policy of obtaining the lowest possible competitive price.

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As this Court's decision in *Paul, supra,* makes clear, a state price regulation that clashes with military procurement policy is invalid under the Supremacy Clause. Moreover, insofar as Mississippi's regulation limits the military's sources of supply, it impermissibly interferes with an important "function of government" which, under the Constitution, must be left "free from regulation by any state" (*Mayo* v. *United States,* 319 U.S. 441, 445, 447).

The Twenty-first Amendment, which in any event applies only with respect to the concurrent jurisdiction bases, does not diminish the exclusive congressional authority to regulate military affairs and does not empower Mississippi to intrude upon the federal procurement function. The federal government's freedom from state regulation "is inherent in sovereignty" (*Mayo, supra,* 319 U.S. at 447) and is not abrogated by the State's assertion of power under the Twenty-first Amendment.

ARGUMENT

I

THE MISSISSIPPI REGULATION IMPOSES AN UNCONSTITUTIONAL TAX UPON INSTRUMENTALITIES OF THE UNITED STATES

A. THE MARKUP IS A TAX ON FEDERAL INSTRUMENTALITIES THAT IS BARRED BY THE CONSTITUTIONAL PRINCIPLE OF FEDERAL IMMUNITY FROM STATE TAXATION

1. Instrumentalities of the United States are immune from state taxation.

"[S]ince 1819, when Chief Justice Marshall in [*McCulloch* v. *Maryland,* 4 Wheat. 316] expounded the principle that properties, functions, and instru-

mentalities of the Federated Government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application" (*United States* v. *County of Allegheny,* 322 U.S. 174, 176). The reaches of that constitutional immunity, particularly insofar as it protects persons who act for or deal with the United States, have expanded and contracted over the years. "But unshaken, rarely questioned, * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation" (*id.* at 177). See also *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 117–118, 122.

If, therefore, the Mississippi markup requirement operates as a tax on instrumentalities of the United States, it is constitutionally invalid unless Congress has consented to the tax or unless the State's assertion of power under the Twenty-first Amendment abrogates the federal government's tax immunity.

2. The Mississippi markup is a tax on federal instrumentalities.

The district court found, and the parties agree, that the State's regulation requiring out-of-state distillers to collect a markup on their sales of alcoholic beverages to military purchasing facilities is a tax (J.S. App. 8a) and that the purchasing facilities are instrumentalities of the United States entitled to the same immunity from state taxation to which any other arm of the federal government is entitled (*id.* at 9a). The district court also stated—and with this, too, we take

no issue—that the constitutional principle of federal tax immunity bars only "a state tax whose legal, as opposed to purely economic, incidence falls upon the federal government" (*id.* at 17a). See *Alabama* v. *King & Boozer,* 314 U.S. 1, 8–9; *James* v. *Dravo Contracting Co.,* 302 U.S. 134, 160.

The parties, therefore, are on common ground with the district court to this extent: all agree that "[t]he touchstone for our inquiry [on the tax immunity issue] * * * is the point of legal incidence of Mississippi's wholesale markup on alcoholic beverages" (*ibid.*). If the legal incidence of the tax falls upon the out-of-state distillers, the government is not protected by the doctrine of federal tax immunity. If the legal incidence falls upon the military purchasing facilities, however, the tax violates the immunity principle.

The district court concluded that the legal incidence of the Mississippi markup is upon the distillers rather than the military purchasers (J.S. App. 18a–24a). That conclusion, however, rests upon a definition of legal incidence—"the legally enforceable, unavoidable liability for nonpayment of the tax" (*id.* at 18a)—which this Court rejected in *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339, a decision that controls the present case.

In *Agricultural Bank,* the Court invalidated a Massachusetts sales tax as applied to purchases of tangible personal property by a national bank.[4] One

[4] The bank's immunity from the tax was conferred by a federal statute, and the Court therefore found it "unnecessary to reach the constitutional question of whether today national

of the issues was whether the statute imposed the sales tax upon the bank as a purchaser or upon its vendors. The state court had held, as the district court held in the present case, that "[t]he legal incidence of a tax [is] * * * determined by 'who is responsible * * * for payment to the state of the exaction'" (229 N.E. 2d 245, 249) and that under that test the legal incidence of the tax fell upon the vendor, not the purchaser.

This Court rejected the state court's reliance upon legal liability as the test of legal incidence. "It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (392 U.S. at 347).[5]

Like the Mississippi regulation in this case, the Massachusetts statute required the vendor to add the tax to the sales price, collect it from the purchaser, and remit it to the State. This Court accordingly viewed the statute as establishing "a clear requirement that the sales tax be passed on to the purchaser" (*ibid.*). It is true that the Massachusetts statute, unlike the Mississippi regulation, prohibited vendors

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banks should be considered nontaxable as federal instrumentalities" (392 U.S. at 341). As we indicated above, there is no dispute here over whether the military purchasing facilities are instrumentalities of the United States entitled to immunity from state taxation.

[5] See also *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753. The statute there required out-of-state sellers to collect a use tax from in-state purchasers and to remit it to the State. Although the seller was "made directly liable for the payment of tax whether collected or not," the Court stated that the incidence of the tax was upon "the user of the goods to whom the out-of-state retailers sells" (386 U.S. at 757, n. 9).

from advertising that they would absorb the sales tax. But that was not a decisive consideration in this Court's view of the case.

What the Court considered conclusive was the obvious intention of the state legislature that the tax be collected by the seller and paid by the purchaser. "There can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling" (392 U.S. at 348).

The legal incidence of Mississippi's wholesale markup similarly falls upon the purchaser and not the seller. The obvious intention of the Mississippi Tax Commission is to require out-of-state distillers to add the markup to their liquor prices and to pass the markup on to the military purchasing facilities. Regulation 25 provides that direct orders from military facilities "shall bear the usual wholesale markup," that "[t]he price of such alcoholic beverages shall be paid by such organizations directly to the distiller," and that the distiller "shall in turn remit the wholesale markup" to the State (App., *infra*. p. 48). Moreover, the Tax Commission informed alcoholic beverage suppliers by letter that, in order to comply with Regulation 25, "[t]he mark-up regulatory fee * * * must be invoiced to the Military and collected directly from the Military" (A. 38). The regulatory design here is no less clear than the legislative design in *Agricultural Bank*. In both cases, the seller collects the tax and the purchaser pays it.

The district court in the present case thought it significant, however, that "Mississippi's ABC Act and regulations do not impose any sanctions on the vendor if he absorbs all or any portion of the mark-up's economic burden" (J.S. App. 21a). But the Tax Commission itself takes a contradictory view of the matter. In a letter to distillers interpreting Regulation 25, the Commission stated unequivocally that "[a]ny supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without * * * collecting [the markup] fee directly from the said Military organization shall be in violation" of the statute and regulation and therefore subject to civil and criminal sanctions (A. 38–39).

Moreover, this Court rejected in *Agricultural Bank* a contention that, "simply because there is no sanction against a vendor who refuses to pass on the tax * * *, this means the tax is on the vendor" (392 U.S. at 348). Where, as here, the tax is intended to be borne by the purchaser, the legal incidence is on the purchaser whether or not the seller is free to absorb the tax without sanction. As this Court stated, "it seems clear to us that the force of the law * * * is such that, regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written" (*ibid.*).

Moreover, it is unrealistic to think that the distillers, even if they were free to do so, would voluntarily absorb markups of 17 and 20 percent, which would probably constitute a major portion of their profit on the sales.

The district court also considered it significant that the Mississippi Tax Commission requires distillers who make direct sales to the military to remit the proper markup in advance of its collection from the military.[6] "Since the tax must be prepaid by the seller," the court stated, "it can never become a debt to the supplier separate from the total sales price, nor is it recoverable at law from the purchaser" (J.S. App. 21a).

We do not understand, however, why prepayment of the tax by the seller means that there can be no legal obligation on the part of the purchaser to reimburse the seller, nor do we agree, in any event, that the absence of such obligation is constitutionally significant. What is important is not when the tax is to be remitted to the State by its collecting agent, or whether the agent may sue at law for reimbursement, but whether the law contemplates that the tax be paid by the purchaser. As we have shown, Regulation 25 requires the distillers to collect and the military to pay the established markup on direct liquor sales. It imposes "a sales tax which by its terms must be passed on to the purchaser" (*Agricultural Bank, supra,* 392 U.S. at 347), and it is therefore upon the purchaser that the legal incidence falls.

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[6] Regulation 25 itself directs distillers to remit the markups collected from the military "monthly covering shipments made for the previous month" (App., *infra*, p. 48). The Tax Commission informed distillers by letter, however, that the markup on direct sales to the military "must be remitted directly to this Division on the date shipments are made to the Military base" and must subsequently be invoiced to and collected from the military purchasing facility (A. 38).

That conclusion is fortified by this Court's decision in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110. The Court there held that a state sales tax was unconstitutional as applied to a purchase by the United States, acting through a private contractor designated as the government's purchasing agent, of diesel tractors to be used in constructing a naval ammunition depot. Although the state statute characterized the seller as the taxpayer and required the seller to pay the tax to the Tax Commissioner, it also provided, like the regulation in the present case, that the seller "shall collect the tax levied hereby from the purchaser" (347 U.S. at 111).

It was undisputed that the legal incidence of the sales tax fell upon the purchaser, since the seller was required to collect it from the purchaser. The principal issue in the case was whether the "purchaser" of the tractors was the government or the private contractor. The Court held, on the basis of the federal Procurement Act and the terms of the contract, that the United States was the purchaser and that the tax was therefore invalid.[7]

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[7] Our analysis is also buttressed by the decision in *Colorado National Bank* v. *Bedford*, 310 U.S. 41. The Court there upheld a state tax of two percent on the value of certain services rendered by banks, requiring the bank to collect the tax from its customers and remit it to the State. A national bank challenged the application of the tax to its safe-deposit services, arguing that national banks are immune from such state taxation. The Court assumed that "the tax is invalid if laid upon the bank as an instrumentality of government" (310 U.S. at 50). It held, however, that the "tax is upon the user of the safe-deposit boxes, not upon the bank" (*id.* at 51). "The funds which were received by the State came from the assets of the

Alabama v. *King & Boozer*, 314 U.S. 1, does not support the district court's conclusion that the Mississippi tax is on the distiller. The Court upheld in that case the constitutionality of a state sales tax as applied to a purchase of building materials by a federal contractor for use in performing a "cost-plus" contract to construct an army camp. As in *Kern-Limerick*, the state statute made the seller the "taxpayer" but required him "to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax" (314 U.S. at 7). The state courts had accordingly "construed these provisions as imposing a legal obligation on the purchaser to pay the tax" (*ibid.*), and there was no contention that the legal incidence in fact fell upon the seller. As in *Kern-Limerick*, the principal question was whether the contractor or the United States should be deemed the purchaser. In *King & Boozer*, however, the Court resolved that issue against the government.

The significance of these cases for present purposes is that both involved sales taxes which—like the Mississippi markup—were to be collected by the seller from the purchaser. The decisions turned not on whether the purchaser or the seller bore the legal incidence of the tax, but on whether the government or its contractor was the purchaser; for it was clear that

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user, not from those of the federal instrumentality, the bank" (*id.* at 52). Although the Court thus rejected the claim of immunity, the decision supports our submission that the legal incidence of a sales tax falls not upon the seller who is required to collect and remit the tax to the State, but upon the purchaser who is required to pay it.

the legal incidence was upon the purchaser. Both decisions reinforce our position here. A state statute requiring a seller to collect a sales tax from the purchaser and to remit it to the State imposes the legal incidence of the tax upon the purchaser.

In some cases, of course, this Court determined that the legal incidence of a tax was on the seller rather than the purchaser. In none of those cases, however, did the statute require the seller to collect the tax from, or pass it on to, the purchaser. See, *e.g.*, *American Oil Co.* v. *Neill*, 380 U.S. 451, 455–457; *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, 371–372, 381–382; *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 535, 537.

The district court's conclusion in the present case is, in sum, a radical and unwarranted departure from sound precedent. Its effect is to reject a principle that has been applied without exception in prior decisions and that this Court in *Agricultural Bank* considered "indisputable": "a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax on the purchaser" (392 U.S. at 347). We think this Court's decisions make clear that the legal incidence of Mississippi's markup is on the military purchasers, not the distillers. If so, it follows that the markup violates the constitutional principle of federal immunity from state taxation.[8]

[8] It also follows, as we show later in this brief (pp. 31–33, *infra*), that the United States has not consented under the Buck Act to the imposition of the tax on sales to military facilities located on the two bases over which the United States exercises exclusive jurisdiction.

B. THE STATE'S POWER UNDER THE TWENTY-FIRST AMENDMENT TO REGULATE TRANSACTIONS IN ALCOHOLIC BEVERAGES DOES NOT NEGATE THE FEDERAL GOVERNMENT'S IMMUNITY FROM STATE TAXATION

If, as we have shown, the markup imposes on instrumentalities of the United States a tax that would be unconstitutional in the absence of the Twenty-first Amendment, it remains for the Court to determine, with respect to the two concurrent jurisdiction bases, whether the subject matter of the Mississippi tax—alcoholic beverages—vitiates the constitutional immunity.[9]

Decisions of this Court establish that the Twenty-first Amendment does not supersede "all other provisions of the United States Constitution in the area of liquor regulations," although "the broad sweep" of the Amendment "has been recognized as conferring something more than the normal state authority over public health, welfare, and morals" (*California* v. *LaRue*, 409 U.S. 109, 114, 115).[10] The primary impact

[9] That issue need not be considered with respect to the exclusively federal enclaves, because, as this Court held in its prior opinion in this case, "the Twenty-first Amendment confers no power on a State to regulate * * * the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction" (412 U.S. at 375). It is only with respect to the concurrent jurisdiction bases that the Twenty-first Amendment can be said to have any application.

[10] Unlike the present case, where the State's regulation is meant only to raise revenue, *California* v. *LaRue* involved an effort by the state liquor commission to eliminate criminal and immoral behavior associated with the consumption of alcoholic beverages in establishments that provided explicitly sexual entertainment. There is here no such focus upon the welfare or morals of Mississippi's residents.

of the Amendment is upon the Commerce Clause; yet, although the Amendment was intended to remove "traditional Commerce Clause limitations" restricting state regulation of liquor, this Court has emphasized that the Amendment has neither "repealed" nor "obliterate[d]" even that Clause (*Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329–330, 332).

When a State's power to regulate alcoholic beverages under the Twenty-first Amendment collides with a conflicting interest under the Constitution, "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case" (*id.* at 332). We submit that a consideration of the Twenty-first Amendment in light of the fundamental constitutional principle of federal tax immunity, and in light of the interests at stake in this case, indicates that the tax imposed here cannot stand.

Although the Constitution contains no clause providing federal tax immunity, this Court has recognized from the start that the doctrine is deeply rooted in the concept of federalism. The state tax struck down in *McCulloch* v. *Maryland*, 4 Wheat. 316, 425, was "in its nature incompatible with, and repugnant to, the constitutional laws of the Union." Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared" (*id.* at 436). The doctrine has been aptly described as "one of the cornerstones of our constitutional law" (*Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 610).

To sustain the Mississippi markup as applied to military clubs would require a holding that the

Twenty-first Amendment abrogated the tax-immunity principle so far as intoxicating liquor is concerned. See *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 345. One would expect that before Congress and the state legislatures were to alter so fundamental an incident of federalism they would have clearly expressed an intention to do so. Yet nothing in the language of the Amendment or in its history suggests even an awareness of that consequence, much less a purpose to accomplish it.

The principal objective of the Amendment was to confer upon the states the power—previously preempted by the federal government in the Eighteenth Amendment—to regulate commerce in alcoholic beverages notwithstanding potential Commerce Clause limitations. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra,* 377 U.S. at 329–331; *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 536–538. The sponsor of the resolution that became the Twenty-first Amendment explained that it would restore "to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." 76 Cong. Rec. 4141 (remarks of Senator Blaine). See also 76 Cong. Rec. 4145, 4170, 4219 (remarks of Senators Wagner, Borah, and Walsh).

In the House, it was recognized that the Amendment would not alter the principles of federalism. Repeal of the Eighteenth Amendment "does not seek to change the fundamental law which was subscribed to by Washington, Franklin, Madison, Hamilton and the other immortals of the Constitutional Convention," but rather would be a "return to the federated

Republic which they founded * * *." 76 Cong. Rec. 4513 (remarks of Representative Beck). See also 76 Cong. Rec. 4514, 4520 (remarks of Representatives Dyer and Cole). It was noted also that the Twenty-first Amendment would be of financial advantage to the federal government, which could eliminate the expense of enforcing prohibition while at the same time raising tax revenues on liquor. See 76 Cong. Rec. 4148, 4508, 4510 (remarks of Senator Wagner and Representatives Rainey and Lichtenwalner). No offsetting loss of federal tax immunity was mentioned.

When the Twenty-first Amendment was invoked to support a state law that conflicted with the export-import clause (Article I, Section 10, Clause 2), this Court, concluding that nothing in the language or history of the Amendment suggested a repeal of the clause, held that the Amendment is subordinate. *Department of Revenue* v. *James B. Beam Distilling Co.*, *supra*. On the same analysis, the Amendment must yield here to the fundamental constitutional principle that a state may not tax an instrumentality of the United States.

This is particularly so in the circumstances of this case, for the markups imposed by the Mississippi regulation are not designed to protect the health, welfare, or morals of its citizens, but rather to raise revenue by taxing liquor sales to military facilities. Those facilities are organized and operated pursuant to Air Force and Navy regulations, with an assigned mission of promoting the morale and efficiency of military personnel by providing dining, social, and recreational facilities (AFR 34-3, Vol. IV, ¶ 1-1;

NAVPERS 15951, ¶ 101).[11] They are not operated for the profit of any person or group (AFR 34–3, Vol. IV, ¶ 4–3; NAVPERS 15951, ¶ 104(b)), and no individual has any financial or proprietary interest in the assets of the clubs (AFR 34–3, Vol. II, ¶ 3–1b; NAVPERS 15951, ¶ 104(b)). Although the clubs are required to be self-sustaining, any operating gains are passed along to patrons in the form of reduced prices or improved services or facilities (AFR 34–3, Col. IV, ¶ 4–3; NAVPERS 15951, ¶¶ 1005, 1009). And, though operated with nonappropriated funds, the clubs perform activities necessary to the proper functioning of the armed forces, contributing significantly "to the establishment and maintenance of Service morale and esprit de corps" (A. 41). Cf. 32 C.F.R. 538.1(c)(1).

If the Mississippi regulation, like the one in *California* v. *LaRue, supra,* were designed to protect the health or welfare of its citizens, and if the federal instrumentalities were engaged in a less significant enterprise than promoting the morale and efficiency of the armed forces, the resolution of the constitutional issue might be more difficult. In the circumstances of this case, however, giving the tax immunity doctrine precedence will not interfere with the kind of state regulation that the Twenty-first Amendment was principally designed to permit. Whatever else

[11] The regulations cited in the text are those that are currently in force. The pertinent paragraphs do not materially differ from the regulations that were in force at the time this litigation commenced. The earlier regulations are a part of this record, appearing as Exhibits 19 (AFR 176–1), 20 (AFM 176–3), and 21 (NAVPERS 15951) to the stipulation of facts.

the Amendment does, there is no reason to think that it was intended to negate federal tax immunity and to authorize the imposition of a sales tax upon facilities of the armed forces.

C. THE MARKUP IS ALSO UNCONSTITUTIONAL BECAUSE IT DISCRIMINATES AGAINST THE UNITED STATES AND THOSE WITH WHOM IT DEALS

"It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals" (*United States* v. *City of Detroit,* 355 U.S. 466, 473). Thus, in *Phillips Chemical Co.* v. *Dumas Independent School District,* 361 U.S. 376, this Court invalidated a local tax on the use of federal property by private lessees because similarly situated lessees of state property were subjected to a significantly less burdensome tax. The Court could find no adequate justification for "so substantial and transparent a discrimination against the Government and its lessees" (361 U.S. at 387), and the tax was therefore held unconstitutional. "[I]t does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself" (*id.* at 385). See also *Moses Lake Homes, Inc.* v. *Grant County,* 365 U.S. 744.

In the present case, the district court recognized that a discriminatory tax would be invalid, but it held that "[t]here [is] no discrimination against the federal government within the State's tax scheme" (J.S. App. 36a). We disagree. Regulation 25 discriminates

against the United States and those who deal with it in two respects.[12]

First, if we are correct that the incidence of the tax is upon the purchasing facility rather than upon the out-of-state distiller, then the tax is discriminatory because all other retailers in the State who are required to pay a markup receive wholesaling, warehousing, and delivery services from the Tax Commission in exchange. The military facilities, however, receive no services whatsoever in return for the markup imposed on their direct purchases from out-of-state distillers (A. 37). It is no answer to say that the tax is nondiscriminatory because all retailers pay an identical markup of 17 or 20 percent. The military facilities, which perform their own wholesaling, storage, and delivery services, are differently situated from the State's licensed retailers, who receive their wholesaling services from the State. The equal treatment of persons who are differently situated is no less an invidious discrimination than the unequal treatment of persons who are similarly situated. Cf. *Yu Cong Eng* v. *Trinidad,* 271 U.S. 500; *Lau* v. *Nichols,* 414 U.S. 563.

Second, if the legal incidence of the tax is deemed to fall upon the distiller rather than the military purchasers, then the tax is discriminatory because it is levied only upon those who deal with the United States

[12] Although the discriminatory effect of Mississippi's tax was not discretely briefed by the parties in the district court, the question was implicitly raised in the parties' general discussions of the State's taxing scheme, and the district court accordingly decided the issue, in our view erroneously.

and not upon those who deal with the State itself. A distiller who sells only to the State Tax Commission is free of any markup. A distiller who sells to the military facilities, however, is required to pay a 17 or 20 percent tax on each such sale. Under the decisions of this Court, the tax is invalid because it fails to "treat those who deal with Government as well as it treats those with whom [the State] deals itself" (*Phillips Chemical Co.* v. *Dumas Independent School District, supra*, 361 U.S. at 385).

II

THE UNITED STATES HAS NOT CONSENTED TO THE IMPOSITION OF THE STATE'S MARKUP TAX ON THE SALE AND DELIVERY OF ALCOHOLIC BEVERAGES BY OUT-OF-STATE SUPPLIERS TO THE PURCHASING MILITARY FACILITIES LOCATED ON THE TWO EXCLUSIVELY FEDERAL ENCLAVES, AND MISSISSIPPI IS THEREFORE WITHOUT POWER TO TAX THOSE TRANSACTIONS

As applied to liquor sales by out-of-state suppliers to military purchasers on the bases over which the United States exercises exclusive jurisdiction, Mississippi's markup is constitutionally invalid for the wholly independent reason that the State lacks territorial authority to regulate the transaction by taxation or otherwise. This much was established by the Court's prior decision in this case: "with respect to the initial sale and delivery of the liquor by the suppliers to military facilities located in exclusively federal enclaves, nothing occurs within the State that gives it jurisdiction to regulate the initial wholesale transaction" (412 U.S. at 371). In the absence of congressional consent, therefore, "the Tax Commission [may] not attach its

markup to the sale and delivery of liquor by out-of-state suppliers to nonappropriated fund activities within Keesler Air Force Base and the Naval Construction Battalion Center" (*id.* at 373).

The district court concluded, however, that "Congress has legislatively acceded to Mississippi's markup on such wholesale liquor transactions" (J.S. App. 7a). Congressional consent was given, according to the court, in the Buck Act, which provides that "[n]o person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, * * * on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area" (4 U.S.C. 105(a)). "Sales or use tax" is defined as "any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property" (4 U.S.C. 110(b)).

The general consent given in Section 105(a), however, is qualified by Section 107(a), which provides that Section 105 "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof * * *." The district court concluded that the Section 107(a) exception is inapplicable because "the legal incidence of the markup was intended to be levied upon and borne by the controlled wholesaler rather than the military purchaser" (J. S. App. 24a). But that holding, as we have shown, is bottomed on an erroneous definition of legal incidence.

For the reasons stated earlier in this brief, we submit that the Mississippi markup is a tax levied on an

instrumentality of the United States, to which Congress has not consented in the Buck Act or elsewhere. It follows that the State lacks territorial authority to tax the liquor transactions between the out-of-state distillers and the military purchasers on the exclusively federal enclaves. The markup is thus invalid as applied to those transactions, regardless of its validity as applied to sales to facilities located on the concurrent jurisdiction bases.[13]

III

THE MISSISSIPPI REGULATION IS INVALID UNDER THE SUPREMACY CLAUSE BECAUSE IT CONFLICTS WITH FEDERAL PROCUREMENT REGULATIONS AND POLICY

Regulation 25 is constitutionally invalid for yet another reason. It impermissibly interferes with the exclusive federal authority to regulate military procurement.[14]

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[13] Moreover, with respect to those direct purchases in which title passes to the United States outside the jurisdictional limits of Mississippi and delivery to the bases is effected by the government, the Buck Act is also inapplicable because the sale does not occur "in whole or in part within a Federal area" (4 U.S.C. 105(a)).

[14] This argument applies with respect to all four military bases in Mississippi. The district court declined to reach this issue with respect to the exclusively federal enclaves, because it erroneously concluded that consent to a tax under the Buck Act foreclosed an independent challenge to the tax as an unconstitutional interference with military procurement regulations (J.S. App. 25a–26a, n. 21). But 4 U.S.C. 105(a) provides only that "[n]o person shall be relieved from liability for payment of * * * any sales or use tax levied by any State, * * * *on the ground that the sale or use * * * occurred in whole or in part within a Federal area*" (emphasis added). The section does

1. Article I, Section 8, of the Constitution gives Congress broad authority to "raise and support armies," to "provide and maintain a Navy," and to regulate "the land and naval Forces." In addition, Article IV, Section 3, empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." In the exercise of its constitutional power, Congress has authorized the Secretary of Defense "to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces" on military bases (50 U.S.C. App. 473).

Pursuant to that delegation of plenary authority, the Secretary of Defense promulgated regulations establishing a uniform Defense Department policy governing the procurement and sale of alcoholic beverages by military facilities in the United States (32 C.F.R. 261). The regulations direct that "the purchase of all alcoholic beverages for resale at any * * * base * * * within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price, and other factors considered" (32 C.F.R. 261.4

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not preclude a challenge to a tax on some ground other than the one specified. Its effect is only to place enclaves on an equal footing with concurrent jurisdiction bases for purposes of state sales taxes. As the Senate Report stated, Section 105 "will not affect any right to claim any exemption from such taxes on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred" (S. Rep. No. 1625, 76th Cong., 3d Sess., p. 2).

(c)(1)). They also provide that, while it is the policy of the Defense Department to cooperate with local, state, and federal officials with respect to the procurement of alcoholic beverages, that "policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to State control" (32 C.F.R. 261.4(c)(2).[15]

2. Mississippi's Regulation 25 conflicts with the liquor procurement policy established by the Secretary of Defense in two respects. It frustrates the federal objective of obtaining alcoholic beverages on the most favorable competitive terms possible, and it impermissibly restricts the military's opportunity to choose among potential out-of-state liquor suppliers.

By requiring out-of-state distillers to collect a markup on every sale of alcoholic beverages to mili-

[15] Prior to 1966, the regulations expressed even more explicitly the Defense Department's policy against submitting to state control over the military's procurement of alcoholic beverages. They directed military facilities to obtain "the most advantageous contract, price and other factors considered, *without regard to prices locally established by state statute or otherwise.*" 32 C.F.R. 261.4(c)(1) (1966 rev.) (A. 33). The Defense Department memoranda (A. 43–58) recommending the deletion of the italicized clause show that the purpose was solely to correct the misunderstanding of some clubs that the clause barred them from procuring liquor from monopoly or control states even if the state price was the most advantageous. In explaining the change, the Assistant Secretary of Defense for Manpower stated: "It would * * * remove any possible implication that negotiation with a state official must be avoided" (A. 58).

The amendment to the regulation thus left unchanged the basic procurement policy of seeking the lowest competitive price and the most favorable terms. Contrary to appellees' suggestion (Motion to Dismiss or Affirm, p. 5), the amendment in no way implied a submission to state regulation or price control.

tary facilities in Mississippi, Regulation 25 artificially inflates by 17 or 20 percent the price at which the military purchasers could otherwise obtain their liquor. In effect, it sets a floating minimum price level that is 17 or 20 percent above the "most advantageous" price. This state-imposed inflation of the price of liquor is irreconcilable with the federal policy requiring procurement of liquor at the lowest possible competitive price.[16]

The effect of the markup is to eliminate price competition between out-of-state suppliers and the State Tax Commission for sale of liquor to the military. It requires the out-of-state suppliers to sell at a total price, including the markup, that approximates the State's price for the same product. Although individual distillers are left free to compete among themselves on price, the distillers as a group are eliminated as a serious competitive threat with respect to military sales.

Putting aside for a moment the impact of the Twenty-first Amendment, we submit that the Supremacy Clause would bar Mississippi from imposing such a markup if it were related, for example, to the purchase of milk. In *Paul* v. *United States*, 371 U.S. 245, the Court invalidated under the Supremacy Clause California's minimum price regulation as applied to milk purchased by military installations from appro-

[16] This is not, as appellees contend, "a wholly new contention" (Motion to Dismiss or Affirm, p. 3). We presented the argument in the district court originally, made it again in our brief in this Court at the time of the first appeal, and reiterated it in the district court on remand.

priated funds. The regulation was struck down because it was in conflict with federal procurement law and policy, which, like the regulation issued by the Secretary of Defense with respect to liquor procurement, required price competition "so that the United States may receive the most advantageous contract" (371 U.S. at 253). The Cou stated (*ibid.*):

> While the federal procurement policy demands competition, the California policy, as respects milk, effectively eliminates competition. The California policy defeats the command to federal officers to procure supplies at the lowest cost to the United States by having a state officer fix the price on the basis of factors not specified in the federal law.

There was accordingly, the Court held, a clear and acute "collision between the federal policy of negotiated prices and the state policy of regulated prices" (*ibid.*).

The federal procurement regulation involved in *Paul* reflected "a policy 'to use that method of procurement which will be most advantageous to the Government—price, quality, and other factors considered'" (371 U.S. at 252). The regulation tracked the general procurement statute, applicable to payments out of appropriated funds (10 U.S.C. 2303(a)), which requires that awards be made "to the responsible bidder whose bid * * * will be the most advantageous to the United States, price and other factors considered" (10 U.S.C. 2305(c)). That procurement regulation, the Court held, "directs that negotiations or, wherever

possible, advertising for bids shall reflect active competition" (371 U.S. at 253).

The regulations governing the procurement of alcoholic beverages for military installations closely parallel the language of the general procurement regulation involved in *Paul* and similarly reflect a federal policy of requiring "active competition so that the United States may receive the most advantageous contract" for the purchase of alcoholic beverages (*Paul, supra,* 371 U.S. at 253). Just as the California minimum price regulation in *Paul* collided with general federal procurement policy, the Mississippi markup regulation clashes with the military's liquor procurement policy.

In both cases, state policy disfavors the price competition required by federal regulations. California put a floor on the price of milk sold by private suppliers; Mississippi's regulation obliterates price competition between out-of-state private suppliers and the State's own wholesaling business. Though the means are different, the result is similar. Here, as in *Paul,* the federal policy of obtaining the lowest possible competitive price is frustrated. In addition to *Paul,* see *Public Utilities Commission* v. *United States,* 355 U.S. 534, where the Court held that California could not prohibit common carriers from transporting government property at rates other than those approved by its Public Utilities Commission, because that prohibition conflicted with government procurement law and regulations requiring negotiated

rates and the use of the " 'least costly means of transportation' " (see 355 U.S. at 542).[17]

In addition to its adverse impact on price competition for sales of liquor, Regulation 25 conflicts even more directly with federal procurement policy by purporting to limit the military's freedom to purchase alcoholic beverages from out-of-state sources other than distillers, such as wholesalers and importers. The regulation itself gives military facilities "the option of ordering alcoholic beverages direct from the distiller or from the * * * State Tax Commission" (App., *infra,* p. 48). The Tax Commission recently

[17] *Penn Dairies, Inc.* v. *Milk Control Commission,* 318 U.S. 261, is not to the contrary. The Court there upheld Pennsylvania's refusal to renew the license of a milk dealer who had sold milk to a military facility at bid prices lower than the statutory minimum. The federal regulation there, unlike that here, contained an exception to the general policy of competitive procurement " 'when the price is fixed by federal, state, municipal or other competent legal authority' " (see 318 U.S. at 277). It also contained provisions manifesting a "hands off" policy with respect to state minimum price laws (*id.* at 276, 278). It was on this basis that the Court in *Paul* distinguished *Penn Dairies* (see 371 U.S. at 254–255).

To the extent that *Penn Dairies* required, before finding a conflict between federal and state policy, unambiguous "evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable" (318 U.S. at 275), we think the decision has been eroded by *Public Utilities Commission* and *Paul.* In both cases, the Court was able to discern such a conflict on virtually no stronger indication of congressional purpose than was deemed insufficient in *Penn Dairies.* See 355 U.S. at 547–548 (Harlan, J., dissenting); 371 U.S. at 270–283 (Stewart, J., dissenting).

construed that provision to prohibit purchases by the military from any source other than a distiller. In a memorandum dated August 8, 1973, addressed to "all vendors" and sent also to the military purchasing facilities, the Tax Commission stated that the regulation permits the military to purchase liquor either from the State or "direct from the *distiller*" (emphasis in original) and that "[p]urchases are not to be placed with any other source" (A. 63–64).

Regulation 25, as interpreted by the State Tax Commission, is thus an effort to limit the military's sources of supply. This Court has never sanctioned such a state-imposed restriction on a uniquely federal function. In *Mayo* v. *United States,* 319 U.S. 441, this Court invalidated a Florida fertilizer law insofar as it would have required agents of the United States Department of Agriculture, as a condition to distributing fertilizer pursuant to the Soil Conservation and Domestic Allocation Act, to submit the fertilizer for state inspection and to pay an inspection fee to the State. "[T]he activities of the Federal Government," the Court declared, "are free from regulation by any state. No other adjustment of competing enactments or legal principles is possible" (319 U.S. at 445, footnote omitted).

The state inspection program in *Mayo* served a compelling public purpose: "to assure the consumers that they will obtain the quality of fertilizer for which they pay and that substances deleterious to the land will be excluded from the material sold" (*id.* at 442). That did not, however, justify the exaction of a fee from the United States as a precondition to "execut-

ing a function of government" (*id.* at 447). "Admittedly the state inspection service is to protect consumers from fraud but in carrying out such protection, the federal function must be left free. This freedom is inherent in sovereignty" (*ibid.*).[18]

The principles of *Mayo* are applicable here. Military procurement is a federal function that is constitutionally immune from state interference. The Supremacy Clause forbids a State from dictating to the military what suppliers it may negotiate with and purchase from. That is as true with respect to the procurement of alcoholic beverages as it is with respect to the procurement of rifles.

The nonappropriated fund activities on the four Mississippi bases are as "free from regulation by any state" as were the Agriculture Department employees in *Mayo* (319 U.S. at 445). Mississippi's effort to limit the military's sources of liquor supply impedes the federal procurement function by restricting the range of potential competitors for the military's business. Regulation 25 thus collides with the procurement policy expressed by the applicable Defense Department regulation, it interferes with an important "function

[18] See also *Johnson* v. *Maryland*, 254 U.S. 51, invalidating a state law that penalized a Post Office employee for operating a government vehicle without a state license, and *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187, holding that a State may not require a government contractor to obtain a license prior to executing the contract and performing construction work on an Air Force base within the State. As this Court stated in *Johnson*, a State may not impose "qualifications in addition to those that the Government has pronounced sufficient" (254 U.S. at 57).

of government" (*id.* at 447), and its application to the military facilities in Mississippi is forbidden by the Constitution.

3. Does the Twenty-first Amendment permit Mississippi to defeat military liquor procurement policy by suppressing price competition and forbidding purchases from unapproved sources? There is nothing in the history of the Amendment to suggest that it was intended to diminish the exclusive congressional authority to regulate military affairs. The Amendment removes certain Commerce Clause restrictions to state liquor controls and gives the states broad authority to regulate, in furtherance of the public health, welfare, and morals, the sale, distribution, and use of alcoholic beverages within their territorial jurisdiction.

That authority, however, does not include the power to intrude upon federal functions. The military's freedom from state regulation "is inherent in sovereignty" (*Mayo, supra,* 319 U.S. at 447). Though the State's authority over liquor is broad and may serve important public purposes, the authority must be exercised in such a way that "the federal function [is] left free" (*ibid*). What this Court stated in *Mayo* is no less applicable where the subject matter is federal procurement of alcoholic beverages. Under the Supremacy Clause, a State may not regulate the activities of the federal government. "No other adjustment of competing enactments or legal principles is possible" (*id.* at 445). The Twenty-first Amendment is not an exception to that fundamental rule of federal supremacy.

CONCLUSION

The judgment of the district court should be reversed and the case should be remanded with directions to enter an appropriate decree.

Respectfully submitted.

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APPENDIX

Constitutional Provisions, Statutes, and Regulation Involved

1. Article I, Section 8, of the United States Constitution provides in part:

> The Congress shall have Power * * *
> To raise and support Armies, * * *
> To provide and maintain a Navy;
> To make Rules for the Government and Regulation of the land and naval Forces;
> * * * * *
> To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *.

Article IV, Section 3, provides in part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

Article VI provides in part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

2. Section 105(a) of the Buck Act, 61 Stat. 644, 4 U.S.C. 105(a), provides:

> No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

Section 107(a) of the Act, 61 Stat. 645, as amended, 4 U.S.C. 107(a), provides:

> The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

Section 110 of the Act, 61 Stat. 645, 4 U.S.C. 110, provides in part:

> As used in sections 105–109 of this title—
> (a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

* * * * *

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

3. Section 67–1–41 of the Mississippi Local Option Alcoholic Beverage Control Law, Miss. Code 1972, § 67–1–41, provides in part:

The state tax commission is hereby created a wholesale distributor and seller of alcoholic beverages, not including malt liquors, within the State of Mississippi. It is granted the sole right to import and sell such intoxicating liquors at wholesale within the state, and no person who is granted the right to sell, distribute, or receive such liquors at retail shall purchase any such intoxicating liquors from any source other than the commission. The said commission may establish warehouses, purchase intoxicating liquors in such quantities and from such sources as it may deem desirable and sell the same to authorized retailers within the state including, at the discretion of the commission, any retail distributors operating within any military post or qualified resort areas within the boundaries of the state, keeping a correct and accurate record of all such transactions, and exercising such control over the distribution of alcoholic beverages as seem right and

proper in keeping with the provisions and purposes of this chapter. * * *

Miss. Code 1972, § 27–71–11 provides in part:

> The commission shall add to the cost of all alcoholic beverages such various markups as in its discretion will be adequate to cover the cost of operation of the state wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states.

4. Regulation 25 of the Mississippi State Tax Commission provides:

> Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.
>
> All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month.

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